

**TOWN OF DAVIE
TOWN COUNCIL AGENDA REPORT**

TO: Mayor and Councilmembers

FROM: Monroe D. Kiar, Town Attorney (954) 584-9770

SUBJECT: Resolution

TITLE OF AGENDA ITEM:

**A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA
ACCEPTING THE STIPULATED AGREEMENT AND RESOLUTION
OF CONTRACT DISPUTE RELATED TO THE CONSTRUCTION OF
THE 61ST AVENUE PARK POOL AND RESTROOM BUILDING
PROJECT, AND PROVIDING FOR AN EFFECTIVE DATE.**

REPORT IN BRIEF:

The Town of Davie utilized competitive bidding procedures to select a contractor for the construction of the 61st Avenue Park Pool Restroom Building Project. After completing the competitive bidding process, EDFM Corporation was selected by the Town to construct the 61st Avenue Park Pool and Restroom Building Project. Prior to its completion of the project, EDFM was terminated by the Town “for cause” under the terms of the contract. The Town incurred expenses in completing the project subsequent to EDFM’s termination. Currently, a genuine dispute exists between the parties with regard to whether EDFM was properly terminated and as to whether EDFM is entitled to any sums remaining under the contract that were not distributed to it. The accompanying Resolution and attached Stipulated Agreement represents a proposed settlement and stipulation of all issues currently at dispute in this matter.

PREVIOUS ACTIONS: Although a lawsuit has never been filed by the Town of Davie or EDFM with regard to this matter, the parties have been in intense negotiations in order to resolve the disputes that have arisen between them.

CONCURRENCES:

FISCAL IMPACT:

RECOMMENDATION(S): Motion to approve the Resolution

ATTACHMENTS: Resolution and its Exhibit “A”, the Stipulated Agreement.

RESOLUTION NO:

A RESOLUTION OF THE TOWN OF DAVIE, FLORIDA ACCEPTING THE STIPULATED AGREEMENT AND RESOLUTION OF CONTRACT DISPUTE RELATED TO THE CONSTRUCTION OF THE 61ST AVENUE PARK POOL AND RESTROOM BUILDING PROJECT, AND PROVIDING FOR AN EFFECTIVE DATE.

WHEREAS, the Town of Davie utilized competitive bidding procedures to select a contractor for the construction of the 61st Avenue Park Pool and Restroom Building Project; and

WHEREAS, after completing the competitive bidding process, EDFM Corporation was selected by the Town of Davie to construct the 61st Avenue Park Pool and Restroom Building Project; and

WHEREAS, prior to its completion of the project, EDFM Corporation was terminated by the Town of Davie “for cause” under the terms of the contract; and

WHEREAS, the Town of Davie incurred expenses in completing the project subsequent to EDFM Corporation’s termination; and

WHEREAS, a genuine dispute exists between the parties with regard to whether EDFM Corporation was properly terminated and as to whether EDFM Corporation is entitled to any sums remaining under the contract that were not distributed to it; and

WHEREAS, the parties agree that the proposed Stipulated Agreement and Resolution of Contract Dispute related to the construction of the 61st Avenue Park Pool and Restroom Building Project, which is attached hereto as Exhibit “A”, represents a mutually beneficial settlement of the dispute between the Town of Davie and EDFM Corporation.

NOW, THEREFORE, BE IT RESOLVED BY THE TOWN COUNCIL OF THE TOWN OF DAVIE, FLORIDA:

SECTION 1. The Town Council of the Town of Davie hereby agrees that the Stipulated Agreement and Resolution of Contract Dispute to the Construction of the 61st Avenue Park Pool and Restroom Building Project annexed hereto as Exhibit “A”, represents a mutually beneficial settlement between the Town of Davie and EDFM Corporation.

SECTION 2. The Stipulated Agreement attached hereto as Exhibit “A” has already been signed and dated by EDFM Corporation and as such, shall be signed, dated, and executed by the Town of Davie.

SECTION 3. That upon full performance by the Town of Davie and EDFM Corporation of the Stipulated Agreement, the genuine disputes between the Town and EDFM will be settled.

SECTION 4. Upon any failure on the part of EDFM Corporation to perform under the Stipulated Agreement, this Resolution shall be deemed rejected.

SECTION 5. This Resolution shall take effect immediately upon its passage and adoption.

PASSED AND ADOPTED this _____ day of _____, 2004.

MAYOR/COUNCILMEMBER

ATTEST:

TOWN CLERK

APPROVED THIS _____ day of _____, 2004.

**STIPULATED AGREEMENT AND RESOLUTION OF CONTRACT DISPUTE
RELATED TO THE CONSTRUCTION OF THE 61st AVENUE PARK POOL AND
RESTROOM BUILDING PROJECT**

ENTERED INTO BY AND BETWEEN.
THE TOWN OF DAVIE, hereafter referred to as the "TOWN"
AND
EDFM CORPORATION, a Florida Corporation, hereafter referred to as EDFM
AND
MERCHANTS BONDING COMPANY, an Iowa Corporation, hereafter referred to
as MERCHANTS

THE FOLLOWING CONDITIONS AND STATEMENTS ARE AGREED TO AND SHALL BE
THE PREREQUISITES TO THE RESOLUTION OF THE DISPUTE BETWEEN THE TOWN
AND EDFM RELATIVE TO THE 61st AVENUE PARK POOL AND RESTROOM BUILDING
PROJECT:

WHEREAS, the TOWN utilized competitive bidding procedures to select a contractor for
the construction of the 61st Avenue Park Pool and Restroom Building Project; and

WHEREAS, after completing the competitive bidding process, EDFM was selected by the
TOWN to construct the 61st Avenue Park Pool and Restroom Building Project; and

WHEREAS, prior to its completion of the Project, EDFM was terminated by the TOWN
"for cause" under the terms of the contract; and

WHEREAS, the TOWN incurred expenses in completing the Project subsequent to EDFM's
termination; and

WHEREAS, a genuine dispute exists between the parties with regard to whether EDFM was
properly terminated and as to whether EDFM is entitled to any sums remaining under the contract
that were not distributed to it; and

WHEREAS, the parties agree that an amicable settlement of the dispute will be mutually
beneficial to the parties.

NOW THEREFORE, as a full settlement and resolution of the dispute between EDFM and
the TOWN relative to EDFM's work on the 61st Avenue Park Pool and Restroom Building Project
and in consideration of the monies to be paid under this Agreement as hereinafter set forth, the
adequacy and sufficiency of which is hereby acknowledged, the parties stipulate and agree to the
following provisions:

1. **Amount remaining unpaid to EDFM under the Contract:**

The parties agree that the Amount remaining unpaid to EDFM under the contract between the TOWN and EDFM is currently \$66,619.43.

2. **Rationale for EDFM's termination:**

The parties agree that the status of EDFM's termination shall hereafter be modified to reflect that EDFM was terminated by the TOWN "for convenience" and not "for cause". In consideration of such modification, EDFM shall fully release the TOWN and its officers, employees, agents and elected officials from any and all liability related to any losses that EDFM may have incurred due to the classification of its termination as "for cause". EDFM shall additionally indemnify and hold the TOWN and the above mentioned individuals harmless for any suits at law or in equity brought by any other individual or legal entity related to EDFM's termination by the TOWN. Nothing herein shall grant any rights to third parties or shall be deemed a waiver of sovereign immunity by the TOWN.

3. **Liquidated Damages:**

The TOWN, in consideration for EDFM's acceptance of the provisions of this Settlement, agrees to waive all liquidated damages that it may have been entitled to under the contract due to the alleged untimely completion of work by either EDFM directly or by its subcontractors.

4. **Sums owed under the Contract:**

The TOWN and EDFM agree that EDFM is entitled to collect from the TOWN, as a consequence of this Settlement Agreement the unpaid contract price as specified in paragraph one (\$66,619.43) minus the cost of completion incurred by the TOWN (\$24,170.00) and fees and expenses incurred by the TOWN in bringing about this stipulation (\$18,709). Fees incurred by the TOWN in bringing about this stipulation include legal fees as well as costs incurred by the TOWN related to having Town staff investigate EDFM's claims and any claims made by EDFM's subcontractors.

5. **Sums that EDFM may owe to Subcontractors:**

EDFM acknowledges that any monies that it may owe to any subcontractors, either directly or indirectly utilized by EDFM, for any work done on this project shall be paid by EDFM directly or paid through the "Payment Bond" issued by EDFM for this project. Furthermore, in the event that any subcontractor that provided work on the project files a claim at law or in equity against the TOWN for any unpaid sums, EDFM and MERCHANTS agree to fully indemnify and hold the TOWN harmless for all costs incurred by the TOWN as a result of those actions.

The TOWN agrees to pay EDFM the monies due to it under this Agreement within (45) days of the execution of this Agreement by the TOWN.

It is not the intention of the TOWN, EDFM or MERCHANTS by entering into this Agreement to waive, prejudice or in any way adversely affect any defense that EDFM or MERCHANTS may have against any claim made or asserted by any subcontractor or material supplier to EDFM on the Project described as the 61st Avenue Park Pool and Restroom Building Project. EDFM and MERCHANTS expressly reserve all of their rights under the Payment Bond, at law or in equity to defend against any claim for monies owed by any subcontractor or material supplier on the Project.

6. **Work Product**

The parties agree that any and all work product produced by EDFM during the scope of its contractual relationship with the TOWN, including all owner/operator documents, owner warranties and operational manuals relating to the operation and maintenance of the pool shall be the property of the TOWN. EDFM shall grant to the TOWN all such documents in its possession and warrant that its subcontractors shall grant same to TOWN.

7. **Miscellaneous**

By entering into this Agreement, neither the TOWN, EDFM or MERCHANTS intend to admit any of the claims asserted by and between them, and nothing herein shall be deemed such an admission.

The parties hereto do not intend by any provision hereof to create any third party beneficiaries nor to confer any benefit upon or enforceable rights hereunder or otherwise upon anyone other than the parties hereto.

8. **Governing Law**

This Agreement shall be governed and construed in accordance with the laws of the State of Florida. In the event that any party brings suit for enforcement of the provisions of the Agreement, the prevailing party shall be entitled to recover its reasonable costs, fees, and expenses in addition to any other remedies afforded by law. The venue shall be restricted to Broward County. All parties hereto waive the right to a jury trial with regard to any litigation.

9. **Entire Agreement**

This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof and there are no other agreements, representations or warranties other than as set forth herein. This Agreement may not be changed, altered or modified except through the consent of all the parties and by an instrument signed by all the parties.

10. **Effective Date**

This Agreement shall become effective upon its execution by the parties to the Agreement.

11. **Notices**

Whenever either party desires to give notice unto the other, it must be given in written notice, sent by certified United States mail, with return receipt requested, addressed to the party for whom it is intended, at the place last specified as the place for giving of notice in compliance with the provisions of this paragraph. The party(ies) may change the addresses at which notice is to be given by notice given as provided in this Article. Notices shall be deemed given when received by the addressee.

AS TO TOWN:

Tom Willi, Town Administrator
6591 SW 45th Street
Davie, Florida 33314

AS TO EDFM:

EDFM Corporation
Fernando Rodriguez
1022 N.W. 54 Street
Miami, FL 33127

WITH COPY TO:

Monroe D. Kiar, Esquire
Town Attorney
6191 SW 45th Street, Suite 6151A

WITH COPY TO:

James O. Murphy, Jr., Esquire
524 South Andrews Ave.
Fort Lauderdale, Florida 33301

AS TO MERCHANTS BONDING COMPANY:

Merchants Bonding Company
Mr. Steve Foster
8767 E. Via De Ventura, Suite 370
Scottsdale, AZ 85258

IN WITNESS WHEREOF, the parties have made and executed this Agreement on the respective dates under each signature: TOWN OF DAVIE through its TOWN COUNCILMEMBERS, signing by and through its MAYOR, authorized to execute same by COUNCIL ACTION ON THE _____ DAY OF _____, 2004 and executed by EDFM the _____ day of _____, 2004.

TOWN

TOWN OF DAVIE

BY _____

Attest:

Town Clerk

_____ day of _____, 2004

BY _____

Town Administrator

_____ day of _____, 2004

APPROVED AS TO FORM:

Town Attorney

Witness my hand and seal this _____ day of _____, A.D., 2004

Signed, sealed and delivered
In the presence of:

[Signature]
Witness

[Signature]
EDFM Corporation

MARTIN J. HANSON
Print/Type Name

Florence Weil
Witness

Fernando R. Rodriguez, V.P.

FLORENCE WEIL
Print/Type Name

STATE OF FLORIDA

COUNTY OF DADE

The foregoing instrument was acknowledged before me this 20th day of April, 2004, by Fernando Rodriguez an authorized officer of EDFM Corporation who X is personally known to me or who has produced _____ as identification and who did/did not take an oath.

NW Blackwell
Notary Public, State of Florida, at Large

Nicde M. Blackwell
Print/Type or Stamp Name

My Commission Expires:



N. M. Blackwell
Commission # DD173051
Expires Dec. 22, 2006
Aaron Notary
1-800-350-5161

Witness my hand and seal this 9 day of APRIL, A.D., 2004

Signed, sealed and delivered
In the presence of:

Peggy Graham
Witness

Stan McCormack, E.V.P.
Merchants Bonding Company

Peggy Graham
Print/Type Name

Steve Foster, Claims Examiner STAN MCCORMACK
Witness

Steve Foster, Claims Examiner
Print/Type Name

STATE OF ARIZONA

COUNTY OF MARICOPA

The foregoing instrument was acknowledged before me this 9 day of
APRIL, 2004, by STAN MCCORMACK, an authorized officer of
Merchants Bonding Company who is personally known to me or who has produced
 as identification and who ~~did~~ did not take an oath.

Magdalena R. Loera
Notary Public, State of Arizona, at Large

MAGDALENA R. LOERA

Print/Type or Stamp Name

My Commission Expires:

